Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

DEAN DUNGAN,

Petitioner,

v.

SECRETARY,
UNITED STATES OF AMERICA,
DEPARTMENT OF TRANSPORTATION,

and

JANE GARVEY,
ADMINISTRATOR,
UNITED STATES OF AMERICA,
FEDERAL AVIATION ADMINISTRATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the United States Third Circuit Court of Appeals respectfully erred in affirming the District Court's summary judgement where the record indicates that Mr. Dungan's forced retirement was based on discrimination and a constitutionally impermissible basis of reprisal by the Government.

2. Whether the United States Third Circuit Court of Appeals respectfully erred in concluding that the Government did not violate Mr. Dungan's United States Constitutional Equal Protection rights.

3. Whether the United States Third Circuit Court of Appeals respectfully erred in sanctioning the District Court's departure from the accepted and usual course of judicial proceedings, by denying Mr. Dungan and the potential class action members in this matter, all Pre-Trial Discovery, and all mandated Pre-Trial Procedures, before the entry of a summary judgement.

4. Whether the United States Third Circuit Court of Appeals respectfully erred in concluding that the Age Discrimination in Employment Act did not apply to Mr. Dungan relating to his employment with the Federal Aviation Administration based on the Government's discrimination and disparate conduct.

PARTIES TO THE PROCEEDING

The Petitioner, Plaintiff below in this action, is Mr. Dean Dungan, who resides at 253 Oakfield Drive, Newark, Delaware. He was born March 5, 1944, and is currently age 56.

The Defendant in the action below is the Secretary of the United States Department of Transportation, 400 7th Street, SW, Nassif Building, Washington, D.C., and Jane Garvey, the Administrator of the Federal Aviation Administration, 800 Independence Avenue, SW, Washington, D.C.

All parties to the action are set forth in the caption to this action.

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INTRODUCTORY STATEMENT

This is a case of first impression in the United States of America in both the Federal and State Courts involving critical aviation safety and public policy issues affecting all citizens. Mr. Dungan was employed at the Federal Aviation Administration, as an Air Traffic Area Supervisor, being hired by the F.A.A. on December 7, 1974. During the PATCO Controllers' Strike in 1981, Mr. Dungan remained at his job with the Federal Aviation Administration despite numerous threats to himself, wife, family and friends.

The gravamen of Mr. Dungan's allegations are that, notwithstanding Mr. Dungan's loyalty and conscientious decision to honor his sworn oath and refuse to strike in 1981, **he is now being penalized as a result of malice and the constitutionally impermissible basis of reprisal,** as a result of his age and failure to participate in the 1981 strike, et al., and as such was forced to retire at age 56 at 50% of his pension, pursuant to the mandate of 5 U.S.C. Section 8335, notwithstanding the fact that the rehired PATCO Air Traffic Controllers can work in operational capacities past age 56.

Mr. Dungan's primary argument is that some of his fellow employees of approximately Mr. Dungan's age that entered the Federal Aviation Administration at approximately the same time as Mr. Dungan, that went on strike in 1981 in violation of Federal Law, are being allowed to return to the F.A.A. today past the maximum entry age for any United States Citizen of 36, as well as being authorized to work in Air Traffic well past age 56. In comparison, Mr. Dungan, one of the best qualified,

most dedicated Operational Supervisors in the F.A.A., was forced to retire to make room for these unskilled, untrained, National Security risk individuals, and cannot re-apply for employment as an Air Traffic Controller because he is over the age of 36 years and did not participate in the strike.

CITIATION OF THE OFFICIAL OPINION ENTERED IN THE CASE

Dungan v. Slater, 252 F.2d 670 (3rd Cir. 2001)

STATEMENT OF JURISDICTION

This Honorable Court has jurisdiction over the subject matter of this appeal pursuant to Supreme Court Rule 10 and 28 U.S.C. Section 1254.

The orders in question are the final Order of Senior Judge Raymond J. Broderick of the United States District Court for the Eastern District of Pennsylvania, Docket Number 99-CV-2376, as affirmed by the order of the United States Court of Appeals for the Third Circuit dated March 19, 2001. Rehearing before the United States Court of Appeals for the Third Circuit was timely requested and thereafter denied on June 14, 2001. All Orders and Judgements refereced herein are attached hereto in Appendix "A".

CONSTITUTIONAL PROVISIONS AND STATUTES

Constitution of the United States, Amendment XIV, Section 1 – All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State in which they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

5 U.S.C. Section 7311 – Any person whose employment is suspended or terminated under the authority granted to heads of department and agencies by or in accordance with the said Act of August 26, 1950, or pursuant to the said Executive Order No. 9835 or any other security or loyalty program relating to officers or employees of the Government, shall not be reinstated or restored to duty or re-employed in the same department or agency and shall not be re-employed in any other department or agency, unless the head of the department or agency concerned finds that such reinstatement, restoration, or re-employment is clearly consistent with the interests of the National Security, which record shall be made a part of the record of such department or agency.

29 U.S.C. Section 633(a) – All personnel actions affecting employees who are at least 40 years of age . . . in executive agencies as defined in section 105 of Title 5 shall be made free from any discrimination based on age.

5 U.S.C. Section 8335 (Reproduced in Appendix attached Hereto).

F.R.C.P. 56(c) – (Motion and Proceedings Thereon), The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of the hearing may serve opposing affidavits. The judgement sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgement as a matter of law.

STATEMENT OF THE CASE

That on or about February 9, 1999 Mr. Dungan forwarded to the Secretary of the Department of Transportation, the Administrator of the Federal Aviation Administration and the United States Equal Opportunity Employment Commission a Notice of Intent to Sue. Thereafter, by letter dated March 2, 1999, the United States Equal Employment Opportunity Commission sent a letter to the United States Department of Transportation requesting a response to Mr. Dungan's complaint within 30 days, which response the Department of Transportation did not forward.

On May 7, 1999, Mr. Dungan filed a Complaint in this matter with the Federal District Court for the Eastern District of Pennsylvania. Requests for discovery on behalf of the plaintiff were denied and requests for certification of the class action and pre-trial conferences on behalf of Mr. Dungan were denied.

Thereafter, the defendants filed a Motion for Summary Judgement, which Motion was granted by the District Court on February 24, 2000. Mr. Dungan also filed a Motion for Injunctive Relief with the Trial Court to enjoin the government from terminating his employment, which Motion was denied by the District Court on February 24, 2000.

Mr. Dungan filed a timely appeal of the District Court's February 24, 2000 Order to the Third Circuit Court of Appeals on March 6, 2000. Thereafter, on March 20, 2000, Mr. Dungan filed with the Third Circuit Court of Appeals a Motion for Injunctive Relief which Motion was denied on June 30, 2000. By Order entered by the Third Circuit Court of Appeals dated August 30, 2000, the parties were directed to participate in Appellate Mediation, which took place before Joseph A. Torregrossa, Esquire on October 2, 2000, which process was not successful.

The Third Circuit Court of Appeals entered its Opinion and Order in the defendant's favor dated March 19, 2001. Rehearing before the United States Court of Appeals for the Third Circuit was timely requested and thereafter denied on June 14, 2001.

PETITION FOR WRIT OF CERTIORARI

1. **Whether the United States Third Circuit Court of Appeals respectfully erred in affirming the District Court's summary judgement where the record indicates that Mr. Dungan's forced retirement was based on discrimination and a constitutionally impermissible basis of reprisal by the Government.**

This Honorable Court has held that the District Court's grant of a summary judgement without a full exploration of Mr. Dungan's claim of constitutionally impermissible reprisal is improper, *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694 (1972). Mr. Dungan alleges that he is being discriminated and reprised against because he did not participate in the 1981 PATCO Strike against the government, which reprisal allegation was never explored by the District Court allowing no discovery, pre-trial disclosures, depositions, pre-hearing conferences, et al. This allegation is supported by the record in this matter including the political agenda of former President Clinton who vowed to the AFL/CIO to bring back the PATCO employees purely for political reasons.

Further support of Mr. Dungan's reprisal/discrimination claim is found in the following facts:

1) Mr. Dungan is 57 years of age born 3/5/44.

2) Mr. Dungan commenced his employment as an air traffic controller with the F.A.A. in 1974, and was involuntarily released from employment on June 30, 2000, three months after turning age 56.

3) Mr. Dungan did not participate in the PATCO strike of 1981 and upheld the government's oath not to strike, staying on the job.

4) At the commencement of Mr. Dungan's employment he was never advised of P.L. 92-297, and his personnel file is devoid of any evidence of same.

5) Executive Orders 11785 and 12107 make an individual who participates in a strike against the United States Government a National Security Risk, and could be hired by the government only if it was a matter of National Security.

6) In a Memorandum dated 8/13/93 President Clinton repealed the bar against fired PATCO controllers and directed the Department of Transportation to re-hire these individuals **without preference**.

7) That the fired PATCO controllers were hired back **with preference** including waiver of the mandatory age 56 retirement rule, benefits, pensions, and seniority.

8) That the fired PATCO controllers that were hired at the same time as Mr. Dungan can now work past age 56, while Mr. Dungan was forced to retire at age 56.

9) That the law mandates that no individual can be hired as an air traffic controller past their 31st birthday.

10) That PATCO employees are being hired by the F.A.A. at any age.

11) **That no United States Citizen including Mr. Dungan, could apply for an air traffic**

control position over the age of 31, unless they illegally participated in the 1981 PATCO Strike.

12) That the F.A.A. currently employs air traffic controllers over the age of 56.

13) That the record reflects that no pre-trial procedures were implemented in this matter.

14) That the record reflects that no Discovery or Class Certification was authorized in this matter, despite the request to do so by Mr. Dungan.

15) That 5 U.S.C. Section 8335 mandates that only the Secretary of Transportation be allowed to waive F.A.A. air traffic controllers beyond age 56.

16) That by F.A.A. Memorandum dated 10/5/95, the F.A.A. refused to allow all waivers to be elevated to the Secretary for the pretext of making room for the return of the PATCO Controllers.

17) That in 1998 a Position Paper was prepared by the F.A.A. indicating that Mr. Dungan's Due Process Rights were violated.

18) That by letter dated March 2, 1999, the United States Equal Employment Opportunity Commission sent a letter to the United States Department of Transportation requesting a response to Mr. Dungan's Notice of Intent to Sue within 30 days, which response the Department of Transportation has failed and/or refused to forward.

19) That under the current policy there is no maximum age for the government to bring

back a fired PATCO controller, (i.e., age 60), and there is no maximum retirement age for the returning PATCO controller except the 20 years of service limitation.

20) That Mr. Dungan is clearly more qualified for the job than the returning PATCO controllers who have not controlled air traffic since 1981.

Finally, Mr. Dungan alledged to the District Court and in his Brief to the Third Circuit Court of Appeals, that at all times in this matter his discharge by the government was a mere pretext to allow room for the return of the PATCO employees per the promise by President Clinton to the AFL/CIO, which fact is a major fact at issue in this matter. This issue coupled with the fact that the Federal Aviation Administration is in possession of documents which support this allegation of reprisal as well as Due Process violations, support the statement that the District Court respectfully erred in granting summary judgement based on constitutionally impermissible basis of reprisal.

Mr. Dungan's knowledge of the adverse information in the possession of the government comes from him being advised by his Facility Manager Donald Hughes,[1] and from the Eastern Region Personnel Department, that a position paper was written regarding this matter in

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[1] Who was wrongly reprimanded on October 27, 1999 by David Seaward, Branch Manager AEA-540, for attempting to enforce plaintiff's FOIA request regarding plaintiff's position paper.

August of 1998 by Robert Whitworth, Personnel Operation Specialist,[2] determining that his due process rights, and those similarly situated, were in fact violated. Thereafter this position paper was approved by Jeffrey D. Clarke, Resource Management Branch Manager,[3] and thereafter forwarded to Kitty Durham at F.A.A. Headquarters.[4] On August 27, 1999 Plaintiff requested by way of the Freedom of Information Act (FOIA), the aforementioned position paper, which was not forwarded to plaintiff in violation of the Freedom of Information Act.[5] Plaintiff's favorable F.A.A. position paper/memorandum is similar to numerous other position papers including other affected ATCs facing the prospect of mandatory separation Nationwide.

2. Whether the United States Third Circuit Court of Appeals respectfully erred in concluding that the Government did not violate Mr. Dungan's United States Constitution Equal Protection rights.

In 1981, when President Reagan fired all the air traffic controllers who violated their sworn oath to the United States not to strike, these controllers were subject to the age 56 mandatory retirement age. However, government retirement plans underwent a dramatic change during the PATCO's 12 year absence. The returning

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[2] AEA-540.

[3] AEA-540.

[4] ATX-200.

[5] Such violation may be the subject of a future action against the Federal Aviation Administration for its willful disregard of the provisions of the Act itself.

PATCO controllers were given a choice of retirement plans when they were rejoining the federal government. They were given the option of returning under CSRS or the subsequently enacted FERS. Regardless of their choice, they were allowed to return with the same seniority and pay grade they had prior to their termination. According to an order issued by F.A.A. Administrator, David R. Hinson, on December 23, 1993, "Eligible former controllers may have their pay set on the basis of their highest previous rate under certain conditions. The rate of pay in effect immediately prior to the last rate held generally will be used as the employee's highest rate." *Order 3300.30 Employment Of Former Air Traffic Control Specialist, cancelled on February 1, 1999.* Therefore, any returning fired PATCO controller was given preferential treatment in that they returned to service with their original pay grade suffering no penalty for having been fired in 1981.

While the newly returned PATCO workers are allowed to retain their seniority and pay grade, they are not required to keep the mandatory retirement age they were subject to when they were fired. Instead, they are allowed to return to the F.A.A. employment in the same position they were in just prior to their termination, but are not subject to the harsh requirement of a mandatory retirement at age 56, and are also insulated from the maximum hire age of 31. Instead, they are now allowed to continue to work until age 56 or 20 years service whichever comes later. If a rehire came back at age 55 years old with one year of service, he or she could control air traffic until age 74. This is without regard to the public safety

and public policy concerns of having 74 year old individuals controlling air traffic. Given that the PATCO workers are restored in all aspects to their pre-strike positions, except the mandatory retirement requirements, Mr. Dungan's right to equal protection has been violated.

The defendants have argued that the government is not discriminating based on age, rather the defendants allege that the discriminatory effect arises out of differing types of pension plans and benefits. Assuming, arguendo, that this allegation is true, the result is a facially neutral stature that is administered in a discriminating way. While a statute may be facially neutral and not adopted for discriminatory purposes when executed, the future maintenance of the statute for discriminatory purposes which have a disparate impact will violate the Equal Protection Clause. See generally, *Rogers v. Lodge*, 458 U.S. 613 (1982), holding that an at-large election in a white majority voting population violated the Equal Protection Clause given the maintenance of the facially neutral statute in a discriminatory fashion. Clearly, the F.A.A.'s application of the FERS statute with regard to the re-hired PATCO workers is a prime illustration of a facially neutral statute being used in a discriminatory way and with disparate impact. As noted above, the F.A.A. has selectively allowed certain air traffic controllers who were subject to CSRS prior to their termination, to return to service with all of their previous benefits. There is also a group of air traffic controllers that were pre-Public Law 92-297, who are not subject to the mandatory age 56 retirement and in fact are currently working well past age 56.

Equal Protection Age

Even if the statute is found to have been applied in a non-discriminatory fashion, the defendants have discriminated against Mr. Dungan based on his age, thereby, violating his Equal Protection rights. The Equal Protection component of the Fifth Amendment prevents the Federal Government from making classifications of individuals that are discriminatory in nature. The United States Supreme Court has held that age is not a suspect class. *Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307 (1976), *Gregory v. Ashcroft,* 501 U.S. 452 (1991). Since age is not a suspect class, the "[government's] classification must rationally further the purpose identified by the [government]." *Murgia,* 427 U.S. at 314.

Mr. Dungan was forced to retire at age 56 due to the F.A.A.'s unwarranted contention that once an ATC reaches this age he is no longer able to handle the difficulties and stress associated with the job (See Senate Report and defendants' response). It is clear from the legislative history surrounding the enactment of the age 56 rule that Congress sought to protect the public and air safety by retiring ATCs at an early age. Despite the fact that, in 1972 when the requirement was put into place, Congress based its findings on a report now 30 years old. The current state of F.A.A. employment renders these findings useless. The government simply cannot justify forcing one group of ATCs to retire at the age of 56 because they are considered to be a danger and threat to public safety, yet allow ATCs of an older age to continue in their employment, *Western Air Lines v. Criswell,* 472

U.S. 400 (1985).[6] The mandatory separation age of 56 is no longer rationally related to the legitimate governmental purpose. No such difference underlies the job classification between ATC's. For the government to suggest that requiring certain ATC's to retire much earlier than other ATC's who are performing the exact same job, has some rational relationship to preserving public safety, is ludicrous.

Finally, related to Equal Protection we look at the fired PATCO controllers themselves in relationship to Mr. Dungan and those similarly situated and to all other United States citizens over age 31. As a result of participating in the illegal PATCO strike of 1981, and thereafter returning illegally and contrary to 5 U.S.C. Section 7311, 5 U.S.C. Section 3331, and the criminal sanctions of 18 U.S.C. Section 1918, it is clear that the PATCO employees will enjoy the benefit of working past age 56,[7] with full retirement benefits, not to mention the benefits they gained in other employment from 1981 until the date of their rehire, and are further given preferential hiring treatment over all other United States citizens who are over 31 and want to be an air traffic controller. The Department of Transportation, Federal Aviation Administration has seen fit to overlook the sworn oath taken by all air traffic controllers not to strike against the United States Government, a sworn oath Mr. Dungan faithfully

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[6] Which United States Supreme Court Cases have been upheld because no individual has been allowed to go past a certain age.

[7] Even until age 74, if they are age 55 when they are rehired, and only had one year of service at the time of the strike.

upheld, and in overlooking this sworn oath has rehired the striking controllers placing them in a position of superiority over Mr. Dungan as far as benefits and retirement age, et al., and excluded all other citizens over 31 years of age from employment as air traffic controllers unless they illegally participated in the 1981 PATCO strike. No matter how qualified a United States citizen is for the position of air traffic controller, they cannot apply, nor can Mr. Dungan re-apply, over the age of 31 for the position, unless he participated in the illegal PATCO strike of 1981. This is clear prima facia discrimination.

3. **Whether the United States Third Circuit Court of Appeals respectfully erred in sanctioning the District Court's departure from the accepted and usual course of judicial proceedings, by denying Mr. Dungan and the potential class action members in this matter, all Pre-Trial Discovery, and all mandated Pre-Trial Procedures before the entry of a summary judgement.**

Mr. Dungan's third argument for review by this Honorable Court regards the fact that the District Court respectfully erred in not granting any hearings or arguments in this matter and, by not complying with any of the mandatory Pre-trial Procedures set forth in Federal District Court for the Eastern District of Pennsylvania Local Rule 16.1.

The introductory comments to Local Rule 16.1 state that in the absence of an order to the contrary, the procedures outlined herein will be followed. A review of the record in this matter will reveal that Mr. Dungan was denied:

1) A scheduling Conference;

2) Discovery;

3) Pre-Trial Memorandums, Interim Conferences;

4) The Ability to Amend the Pleadings as may have been necessary.

Further, Mr. Dungan, as a member of a class of Federal Employees similarly situated, was denied the opportunity under Rule 23.1 to move to maintain this action as a "Class Action" pursuant to F.R.C.P. 23, which denial precluded Mr. Dungan and potential class members from maintaining additional issues, claims and defenses that may have been appropriate to their circumstances.

In *Hickey v. Duffy*, 827 F.2d 234 (7th Cir. 1987), the Seventh Circuit held that the District Court **MUST** address the issue of class certification as soon as practical, and cannot dismiss the action until doing so, which consideration and hearing erroneously did not take place by the District Court in this matter.

Appellant acknowledges that trial courts are vested with a wide degree of discretion and latitude when it comes to pre-trial procedures, but when it can be shown that the trial court clearly abused its broad discretion, then the trial court's decision can be disturbed, *Sadowski v. Bombardier*, 539 F.2d 615 (7th Cir. 1976). In the instant case the trial court respectfully allowed **no** pre-trial procedures, discovery, conferences, and memoranduma which prejudiced Mr. Dungan, and those similarly situated, and although it is fully understood by Mr. Dungan that the trial court has broad discretion regarding

pre-trial matters, Mr. Dungan asserts that by the trial court granting no required pre-trial procedures the court abused its discretion.

Finally, this Honorable Court has held in numerous cases that Summary Judgement is available only when, **after adequate time for full discovery** and upon motion, the party seeking summary judgement has satisfied its responsibility of informing the court of the basis for its motion and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of genuine issue of material fact, *Atchison, T. & S. F.R. Co. v. Buell*, 480 U.S. 557, 107 S. Ct. 1410 (1987). No dispute can be made in the instant matter that no discovery took place in clear contradiction of F.R.C.P. 56(c) and the holdings of this Honorable Court. Full Discovery is necessary before a summary judgement decision can be rendered by the Court, *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986). The Third Circuit Court of Appeals precedent in the Dungan case which has been published, if allowed to stand, will render F.R.C.P. 56(c) meaningless, and will place in direct question the clear holdings of this Honorable Court which contravene the Court of Appeals' decision.

4. **Whether the United States Third Circuit Court of Appeals respectfully erred in concluding that the Age Discrimination in Employment Act did not apply to Mr. Dungan relating to his employment with the Federal Aviation Administration based on the Government's discrimination and disparate conduct.**

The District Court matter was instituted to enjoin employment termination, and/or for reinstatement of Mr. Dungan, and damages, to redress the deprivation of rights secured to Mr. Dungan by section 7(b), 29 U.S.C. Section 626(b) of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. Section 621 et seq. ("ADEA"), which incorporates by reference Section 16(b), 29 U.S.C. Section 216(b), of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. Section 201 et seq.

The Petitioner in this action is Dean Dungan, who resides at 253 Oakfield Drive, Newark, Delaware. He was born March 5, 1944, and is currently age 57, with his 56th birthday on March 5, 2000. Mr. Dungan was employed at the United States Federal Aviation Administration, Air Traffic Division Eastern Region, Philadelphia International Airport Air Traffic Control Hub, as an Area Supervisor (FS-2152-12), being hired by the F.A.A. on December 7, 1974. Mr. Dungan was separated from this employment involuntarily on Friday June 30, 2000, when the United States Third Circuit Court of Appeals denied his request for a Stay of Judge Broderick's Order Pending Appeal, notwithstanding the fact that he had already worked three months past age 56.

The Respondents in this Motion are Rodney E. Slater, the former Secretary of the United States Department of Transportation, 400 7th Street, SW, Nassif Building, Washington, D.C., and Jane Garvey, the Administrator of the Federal Aviation Administration, 800 Independence Avenue, SW, Washington, D.C., Appellees in the above captioned action.

This is a case of first impression in the United States of America in both the Federal and State Courts. The gravamen of Mr. Dungan's allegations are that, notwithstanding Mr. Dungan's loyalty and conscientious decision to refuse to strike in 1981, he is now being penalized as a result of his age, et al., and was forced to retire at age 56 at 50% of his pension, pursuant to the mandate of 5 U.S.C. Section 8335 (P.L. 92-297), notwithstanding the fact that the rehired PATCO Air Traffic Controllers can work in operational capacities past age 56 pursuant to 5 U.S.C. Section 8425.

In May of 1972, Congress enacted Pub. L. 92-297 (codified at 5 U.S.C.A. Section 8335). The Legislative history of Public Law 92-297 (H.R. 8083), reveals clearly that the expressed purpose of the law was to "improve the conditions of employment for individuals employed as air traffic controllers in the Department of Transportation by offering preferential retirement benefits" (P.L. 92-297, Legislative History, pg. 2287). The expressed purpose of the Public Law was to offer preferential, not detrimental benefits and treatment, which detrimental benefits and treatment are currently being forced upon Mr. Dungan, and those similarly situated, by defendants.

Further, the Legislative history of Public Law 92-297 (H.R. 8083), reveals that it was to be applied to controllers on a voluntary basis giving them a vested right after 20 years to choose whether to retire or continue their air traffic career. Further, air traffic controllers were being added to the preferential treatment of 5 U.S.C. 8335 over the normal Federal Retirement System because these employees "occupy positions requiring precise skills upon which aviation safety depends".[8]

Thereafter, in 1974 to avert a potential Air Traffic Controllers' Strike, and in the interests of National Security, then-President Nixon signed Executive Order Numbers 11785 and 12107[9] which made it a crime to strike against the Government by United States Government employees, further stating in the Executive Orders that "individuals that participated in strikes against the United States Government were a National Security threat". This Executive Order was incorporated by Congress into 5 U.S.C. Section 7311, entitled Loyalty and Striking, which law is still in place today.[10], [11]

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[8] Although controllers' degradation of ability can no longer be a valid factor for requiring age 56 retirement, in light of the fact that, numerous controllers over age 56 will continue controlling past age 56 until potentially age 74.

[9] As an addendum to Executive Order Number 10450 dated April 27, 1953 entitled Security Requirements for Government Employees.

[10] Further, it was this law that was used by President Reagan to fire the PATCO Air Traffic controllers in August of 1981.

[11] See also 5 U.S.C. Section 3331 and 18 U.S.C. Section 1918.

In direct contravention of Section 7 of President Nixon's Executive Orders' numbers 11785 and 12107, incorporated in 5 U.S.C. Section 7311 which states that "Any person whose employment is suspended or terminated under the authority granted to heads of department and agencies by or in accordance with the said Act of August 26, 1950, or pursuant to the said Executive Order No. 9835 or any other security or loyalty program relating to officers or employees of the Government, shall not be reinstated or restored to duty or re-employed in the same department or agency and shall not be re-employed in any other department or agency, unless the head of the department or agency concerned finds that such reinstatement, restoration, or re-employment is clearly consistent with the interests of the National Security, which record shall be made a part of the record of such department or agency". The individuals who participated in the PATCO strike were allowed to return to the F.A.A. as air traffic controllers in total disregard for National Security. Finally, the Department of Transportation, Federal Aviation Administration discriminated against Mr. Dungan by requiring him to retire at age 56 while rewarding the controllers involved in the PATCO Air Traffic Control Strike of 1981 by rehiring them and thereafter, allowing them to work in a same or similar capacity as Dean Dungan past age 56.

On June 16, 1994, President Clinton made an attempt to appropriate funds from the United States Congress to aid in his quest to bring back the striking PATCO Air Traffic Controllers. Entitled The Federal Aviation Administration Act, it was presented to the 103rd Congress,

which Congress by a vote of 29-65 rejected the Amendment. The rationale for the rejection by the United States Congress was "In sum, President Clinton was wrong to lift the ban on the retirement of PATCO strikers, and we should not compound that error now by giving them preferential, expensive treatment mandated in the Metzenbaum amendment".[12]

The clear language of the ADEA provided that "all personnel actions affecting employees . . . who are at least 40 years of age . . . in executive agencies as defined in section 105 of Title 5 . . . shall be made free from any discrimination based on age", 29 U.S.C. Section 633(a). Based on the facts of the instant matter, Mr. Dungan is clearly covered by the act. Finally, Mr. Dungan suggests that this Court consider the absurdity of the government's position in believing that it is more appropriate to replace seasoned ATCs who have continuously maintained their skill levels for more than twenty years, with the former PATCO employees who have been separated from government service for fourteen years at a minimum. This logic defies comprehension in that the Defendants cannot assert any legitimate governmental purpose other than the promulgation of rules and regulations which clearly discriminate against those ATCs reaching mandatory retirement while rewarding those who violated their oath of allegiance to their country. The express purpose of the provisions of ADEA § 633(a) was designed to safeguard against manifest injustice perpetuated by the F.A.A. against Mr. Dungan and his colleagues. Therefore, since the ADEA prohibits discrimination on the basis of

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[12] 103rd Congress, 2d Session, June 16, 1994, Vote No. 152.

age in Federal government employment. Mr. Dungan contends that the F.A.A.'s denial of his waiver request was clearly motivated by age, which serves as the threshold requirement for establishing a legitimate cause of action under the provisions of the ADEA.

The Third Circuit Court of Appeal in a recent series of Summary Judgement ADEA cases has set forth the test for establishing a prima facia case on behalf of Mr. Dungan. Citing the United States Supreme Court's *McDonnell Douglas*[13] case, this Honorable Court held recently in *Showalter v. Univ. Of Pittsburgh Med. Ctr.*, 190 F.3d 231 (3rd Cir. 1999) that in order for Mr. Dungan to prove a prima facia case for unlawful discharge based on Age Discrimination it must be proved that (i) Mr. Dungan was a member of a protected class, i.e., was 40 years of age or older, (ii) that Mr. Dungan was discharged, (iii) that Mr. Dungan was qualified for the job, and (iv) that Mr. Dungan was replaced by unprotected workers. It is clear in the instant case that Mr. Dungan has made a prima facia case for Age Discrimination and, as such, the trial court erred in dismissing same. Mr. Dungan is over 40 years old, was involuntarily discharged from his employment, is more than qualified for his job, and the defendants have replaced him with unprotected striking PATCO employees, some of whom are younger than him. Further, to date, Mr. Dungan has at all times maintained that his discharge by the government was a mere pretext to allow room for the return of the PATCO employees per the

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[13] 411 U.S. 792, 802 (1973).

promise by President Clinton to the AFL/CIO, which fact is a major factor at issue in this matter.

Further, this Honorable Court has recognized the disparate treatment theory as available under the ADEA. *Hazen Paper Company v. Biggins*, 507 U.S. 604, 609, 113 S. Ct. 1701, 1705 (1993). Under the disparate treatment theory, Mr. Dungan must prove that the employer treats some individuals less favorably than others because of a protected trait or characteristic, under the ADEA age. *Id.* Mr. Dungan must prove a discriminatory motive on the part of the employer, which can be "inferred from the mere fact of differences in treatment[.]" *Id.* Determining whether "discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266, 97 S. Ct. 555, 50 L.Ed.2d 450 (1977).

Mr. Dungan may satisfy the burden for proving "a prima facia case in the absence of direct evidence of discrimination by presenting sufficient evidence to allow a reasonable fact finder to conclude (given the totality of the circumstances) that the defendant treated Mr. Dungan less favorably than others because of his age". *Iadimarco v. Runyon*, 1999 WL 692709, 11 (3d Cir. 1999). The disparate impact theory involves facially neutral practices by an employer relative to the treatment of different groups that impact one group more harshly than another and cannot be justified by business necessity. *Id.* Under this theory proof of discriminatory motive is unnecessary. *Id.* The Supreme Court has set forth the requisite elements required for establishing a claim under the disparate

impact theory in *McDonnell Douglas Corporation v. Green* (411 U.S. 792, 93 S. Ct. 1817). McDonnell Douglas sets up a burden-shifting analysis that requires Mr. Dungan to establish a prima facia case. This analysis "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, in the context of the prongs of the McDonnell Douglas prima facia case, are more likely than not based on the consideration of impermissible factors." *Iadimarco v. Runyon*, 1999 WL 692709, 7 (3d Cir. 1999). In order to establish a prima facia case of age discrimination, "Mr. Dungan must show: 1) that he engaged in a protected activity, 2) that the employer took adverse action against him, and 3) that a causal link exists between the protected activity and the employer's adverse action." *Holmes v. Federal Aviation Administration, United States Department of Transportation*, 1999 WL 771594, 5 (D.N.J. 1999). Mr. Dungan is allowed to "proceed without direct proof of illegal discrimination where circumstances are such that common sense and social context suggest that discrimination has occurred." *Id.* at 4.

Under the *Holmes* analysis Mr. Dungan has established a prima facia case of age discrimination. First, Mr. Dungan is within the protected class covered by the ADEA (i.e., forty years of age or older). Second, the F.A.A. took adverse action against him by arbitrarily and capriciously denying his waiver request while granting waivers to rehired PATCO workers who do not meet the exceptional experience and skills requirements specifically enunciated within the applicable statute. And finally, a causal link exists because, but for the F.A.A.'s discriminatory actions and Mr. Dungan's age, Mr. Dungan clearly satisfied the statutory requirements by

providing proof of exceptional skills and experience; whereas, rehired PATCO workers were not required to do so, and in any event, clearly could not have met the requisite requirements. At this point the burden shifts to the employer "to articulate some legitimate, non-discriminatory reason" for its actions. *McDonnell Douglas*, 411 U.S. at 802. The "defendant's explanation of its legitimate reasons must be clear and reasonably specific." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 258, 101 S. Ct. 1089, 1096 (1981).

In the final analysis of this issue, Mr. Dungan poses the following illustration: Two air traffic controllers are available to control the Nation's air traffic. One is a 70 year old National Security Risk for illegally striking against the government in 1981 and has not controlled air traffic for 19 years, and was hired under 5 U.S.C. Section 8335(a). The other is 56 years old, refused to strike in 1981 in the Nation's interest, is an accomplished controller, Air Line Transport Pilot, and accomplished Air Traffic Control Supervisor with 26 years active experience in air traffic. Needless to say, our 56 year old Mr. Dungan not only was told he must leave the F.A.A. but because he did not participate in the 1981 Strike, is not waived to re-apply for the same position; whereas, our 60-70 year old controller not only can re-apply but is automatically re-hired absent medical deficiencies. This not only amounts to discrimination per se, but by placing our nation in serious peril by bringing back these "former controllers" for pure political reasons, is a clear governmental abuse of power.

ADEA – CONGRESSIONAL/EXECUTIVE BRANCH INTENT

A thorough review of the congressional intent of Congress relating to the ADEA reveals clearly that at no time did Congress intend to authorize age *discrimination*, and/or sanction any type of *discrimination* in the Federal Government. This conclusion of fact and law comes directly from both the legislative branch and the executive branch in this matter, and which legal mandates were overlooked by the Court of Appeals March 19, 2001 decision. In fact both Congress and President Clinton made it clear that discrimination of the fashion Mr. Dungan incurred would not be tolerated. In President Clinton's August 12, 1993 memorandum, the President in no uncertain terms states "that PATCO members should be eligible to apply, without preference, when there are openings with the F.A.A." The facts of this case support the finding that the F.A.A. brought the PATCO members back with preferences. These preferences included et al., that the PATCO strikers could reapply at any age but Mr. Dungan is not eligible to reapply as a result of his age. Therefore, a 56 year old PATCO striker could reapply to the F.A.A. given preference over Mr. Dungan at 56, simply because he did not participate in the 1981 Strike. This Preference is exactly what President Clinton did not authorize.

As to Congress and congressional intent, this Honorable Court respectfully overlooked the fact that on June 16, 1994, President Clinton made an attempt to appropriate funds from the United States Congress to aid in his quest to bring back the striking PATCO Air Traffic Controllers. Entitled The Federal Aviation Administration

Act, it was presented to the 103rd Congress, which Congress by a vote of 29-65 rejected the Amendment. The rationale for the rejection by the United States Congress was "In sum, President Clinton was wrong to lift the ban on the retirement of PATCO strikers, and we should not compound that error now by giving them preferential, expensive treatment mandated in the Metzenbaum amendment".[14]

The conclusion to be drawn from the application of both the Congressional intent and the Presidential directive in this matter is that Mr. Dungan was discriminated against as a result of his age, and was not provided equal protection of the laws of the United States when the PATCO strikers were given preferential treatment in their rehire, to the detriment of Mr. Dungan.

IMPERMISSIBLE PREFERENTIAL TREATMENT

The Court of Appeals respectfully erred in concluding factually that the PATCO members are not being given impermissible preferential treatment (Third Circuit Opinion, 3/19/01, pg. 9) as supported by the following:

a) PATCO members are being given impermissible preferential treatment in that they are being given previous years of service toward seniority when:

   i) Bidding,

   ii) Establishing eligibility for vacation days,

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[14] 103rd Congress, 2d Session, June 16, 1994, Vote No. 152.

iii) In counting total years of service for retirement.

b) PATCO members are being given impermissible preferential treatment in that they can apply and be rehired as an Air Traffic Controller over the age of 36, unlike any other United States Citizen.

CONCLUSION

For the foregoing reasons set forth in this Petition, it is respectfully requested that this Honorable Court grant Mr. Dungan's Petition for Writ of Certiorari.

Respectfully Submitted,

JOSEPH MICHAEL LAMONACA
Attorney for Dean Dungan

APPENDIX "A"

UNREPORTED/NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-1128

DEAN DUNGAN,

Appellant

v.

RODNEY E. SLATER, SECRETARY,
UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION;
JANE GARVEY, ADMINISTRATOR,
UNITED STATES OF AMERICA
FEDERAL AVIATION ADMINISTRATION

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA
D.C. Civil No. 99-cv-2376
District Judge: The Honorable Raymond J. Broderick

Submitted Under Third Circuit LAR 34.1(a)
March 13, 2001

Before: MANSMANN, BARRY, and COWEN
Circuit Judges

(Opinion Filed: March 19, 2001)

MEMORANDUM OPINION OF THE COURT

BARRY, ***Circuit Judge:***

Dean Dungan appeals from the District Court's grant of summary judgment to all defendants in an action in which Dungan alleges that the defendants discriminated against him on the basis of age and violated his constitutional rights to due process and equal protection. Because we agree with the District Court that Dungan's complaint did not state a cause of action under either the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, or the Fifth Amendment, we shall affirm the judgment of the District Court.

BACKGROUND

Dungan began working as an air traffic controller (ATC) in 1974. ATCs at major airports in the U.S. are employees of the Federal Aviation Administration (FAA), an agency of the Department of Transportation (DOT). Like all ATCs who were hired between 1972 and 1987, Dungan was a member of the Civil Service Retirement System (CSRS). 5 U.S.C. § 8301 *et seq.* The CSRS required that an ATC "shall be separated from service on the last day of the month in which he [or she] becomes 56 years of age." 5 U.S.C. § 8335(a). The Secretary of Transportation, however, was given the discretion to permit an ATC "having exceptional skills and experience" to work until age sixty-one. *Id.* The CSRS compensated ATCs for this early mandatory retirement by providing them with more

generous benefits than were received by other federal employees.[1]

In 1981, thousands of ATCs who were members of the Professional Air Traffic Controllers Organization (PATCO) went on strike. Dungan did not join this strike. The striking PATCO members were fired by President Reagan, who barred them from working in any positions with the FAA. In August 1993, President Clinton issued an order permitting the former strikers to be rehired as ATCs. Some undetermined number of former PATCO members have been rehired.

In 1987, Congress adopted the Federal Employee Retirement System (FERS), 5 U.S.C. § 8401 *et seq.*, which replaced the CSRS for many employees, including ATCs, hired after that point. While the FERS changed the retirement scheme for federal employees in many ways, the change most relevant to this case is that it modified the mandatory retirement age for ATCs. Under the FERS, an ATC is not required to retire until reaching twenty years of service or age fifty-six, whichever came later. 5 U.S.C. § 8425(a). Thus, an ATC who entered service after age thirty-six would be permitted to work past age fifty-six.

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[1] For example, an ATC with twenty years of service was permitted to retire with a pension at age fifty, 5 U.S.C. § 8336(e), while most federal employees would have to achieve age sixty before being given a pension after twenty years of service. 5 U.S.C. § 8336(b). Similarly, ATCs were guaranteed a minimum pension payment of 50% of their average salary. 5 U.S.C. § 8339(e). Thus, an ATC retiring after twenty years of service would receive a 50% pension, much more generous than the 36.25% that would be received by a federal employee governed by the general rules. 5 U.S.C. § 8339(a).

The FERS continued to give the Secretary of Transportation the discretion to allow an ATC to work until reaching age sixty-one. *Id.* The retirement of ATCs who were hired before 1987 continues to be governed by the CSRS, although they were given opportunities to change their enrollment from the CSRS to the FERS. Similarly, PATCO members who had been covered by the CSRS and were rehired after President Clinton's order in 1993 were permitted to choose between the two retirement programs. It is undisputed that some of the rehired PATCO ATCs are being permitted to work past age fifty-six.

On June 15, 1998, well before his fifty-sixth birthday, Dungan wrote to his division manager seeking a waiver of the mandatory retirement age so that he could work until age sixty-one. Pursuant to the statutory grant of authority contained in 5 U.S.C. § 8335(a), the Secretary of Transportation had delegated authority to grant such waivers to the Administrator of the FAA. 49 C.F.R. § 1.45(a). The Administrator has adopted an internal procedure under which any waiver request must be reviewed by several intermediate officials before being considered by the Administrator and the Secretary. If any one of those intermediate officials does not approve the request, it is automatically denied. In October 1995, the FAA announced that for the foreseeable future, requests for waivers would not be forwarded to the Administrator, effectively cutting off any possibility of seeking an extension past the mandatory retirement age. Consistent with this policy, Dungan's waiver request was denied by the regional manager.

On May 7, 1999, Dungan filed a four-count complaint in the District Court. Count I alleged that the Secretary

violated the Age Discrimination in Employment Act (ADEA) by requiring Dungan to retire at age fifty-six while allowing other ATCs to work past age fifty-six. In Count II, Dungan contended that the Administrator violated the ADEA by refusing to submit Dungan's waiver request to the Secretary. In Count III, Dungan claimed that the Secretary violated his Fifth Amendment rights to due process and equal protection by refusing to consider his waiver request and by forcing him to retire at age fifty-six while allowing other ATCs to work past that age. Finally, Count IV alleged that the Administrator violated Dungan's due process rights by refusing to forward his waiver request to the Secretary. Although this complaint was styled as a class-action, the District Court held all class-related decisions in abeyance until motions to dismiss or for summary judgment could be considered.

On February 24, 2000, the District Court granted defendants' motion for summary judgment on all counts. In a twenty-three page opinion, the District Court determined that the ADEA did not apply to ATCs, that Dungan had no due process right to have his waiver request considered by the Secretary, and that the different retirement ages for different ATCs were rationally related to a legitimate government purpose and did not violate Dungan's right to equal protection. The District Court and this Court both subsequently denied Dungan's requests for injunctive relief to prevent his termination while his appeal was pending.

In March 2000, Dungan reached age fifty-six. Under the provisions of the CSRS, he was required to retire at the end of that month. Apparently, however, he did not

timely receive the required sixty-day notice of termination, and he was permitted to work until June 30, 2000.[2]

DISCUSSION

On appeal, Dungan disputes the District Court's resolution of each of his claims. He also asserts that the District Court erred by not providing him with the pretrial procedures mandated by the local rules of the Eastern District of Pennsylvania, and by not deciding the issue of class certification.

A. ADEA Claims

In evaluating Dungan's ADEA claims, the District Court noted that while the federal government had been made subject to the act in 1978, *see* 29 U.S.C. § 633a(a), Congress still reserved the power to statutorily impose mandatory retirement ages that would otherwise conflict with the ADEA. *Johnson v. Mayor and City Council of Baltimore*, 472 U.S. 353, 357 (1985). Thus, the District Court properly held that the provision of the CSRS requiring ATCs to retire at age fifty-six did not violate the ADEA.

Dungan argues, however, that he is not disputing the validity of the mandatory retirement age, but is instead challenging the fact that other ATCs, and in particular the rehired PATCO members, are being allowed to work past

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[2] Although there is no evidence in the record before this Court, we assume that Dungan received the required notice on or before May 2, 2000.

age fifty-six. This argument overlooks the fact that the mandatory retirement age of all ATCs is dictated by legislation properly enacted by Congress, regardless of whether the ATCs in question are members of the CSRS or the FERS. It would be paradoxical for this Court to hold that the FAA does not violate the ADEA when it requires an ATC to retire at age fifty-six under the rules of the CSRS, but does violate the ADEA when it permits an ATC to work past age fifty-six consistent with the dictates of the FERS.

Because Congress explicitly authorized both mandatory retirement programs complained of by Dungan, they are outside the scope of the ADEA. On that basis, the District Court properly granted summary judgment to the defendants on Counts I and II of Dungan's complaint. Because this determination is dispositive of the issue, we shall not discuss the alternative grounds for summary judgment offered by the District Court.

B. Equal Protection

Dungan also contends that the Secretary has violated his Fifth Amendment right to equal protection by forcing him to retire at age fifty-six while allowing other ATCs to work past that age. In particular, he claims that the rehired PATCO members are being given unconstitutional preferential treatment because they are allowed to work past age fifty-six.[3] Because the different treatment that

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[3] It is clear from the briefs and from the record that Dungan feels a great deal of indignation over what he perceives as the

Congress mandated for different ATCs is rationally related to a legitimate government purpose, it does not violate the Fifth Amendment.

If federal government action creates distinctions between classes of people, and that action does not impermissibly interfere with fundamental constitutional rights or burden a suspect class, that action does not violate the Fifth Amendment so long as it is rationally related to a legitimate government purpose. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312-13 (1976). There is no allegation in this case that the differing treatment of ATCs under the two retirement systems interferes with any fundamental right. Further, the Supreme Court has determined that classifications based on age do not burden a suspect class. *Murgia*, 427 U.S. at 313-14. In the present case, the two retirement systems are best seen as creating a distinction based on the particulars of individuals' employment, because the question of whether an ATC will be permitted to work past age fifty-six is determined entirely by the retirement system in which he or she is enrolled. *Vance v. Bradley*, 440 U.S. 93, 97 n.10 (1979) ("Since the age factor is present in both groups, the gravamen of appellees' claim [is that the statute] discriminates on the basis of job classification").

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preferential treatment being given to the former strikers. In 1981, Dungan chose to obey the law and refused to join the PATCO strike. Now he has been forced to retire at age fifty-six while some ATCs who, in his view, broke their faith with the FAA are being allowed to work past that age. It is understandable that he feels anger and frustration, but the law can provide no relief.

The distinction created between two groups of ATCs by the CSRS and the FERS is clearly rationally related to a legitimate government purpose. The adoption of the FERS altered the method of calculating annuities for retired ATCs, and had the effect of reducing the annuity to which an average ATC would be entitled.[4] In that context, it is perfectly logical that Congress would choose to grant every ATC an opportunity to earn at least twenty years of service credit, even if that meant letting some ATCs work past age fifty-six. It is also logical that Congress would choose not to force ATCs who were enrolled in the CSRS to transfer to the FERS, which for some ATCs would have the effect of retroactively reducing benefits. Instead, it permitted ATCs covered by the CSRS to select the plan in which to enroll. Regardless of Congress's precise motives, the Supreme Court has noted that federal retirement systems "are packages of benefits, requirements, and restrictions serving many different purposes. When Congress decided to include groups of employees within one system or the other, it made its judgments in light of those amalgamations of factors." *Vance*, 440 U.S. at 109.

Dungan's claim that the rehired PATCO members are being given some kind of impermissible preference also fails. It is true that when the PATCO members were fired,

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[4] Thus, as noted earlier, under the provisions of the CSRS, an ATC eligible for retirement after twenty years would receive a guaranteed 50% pension, 5 U.S.C. § 8339(e), while under the FERS the same ATC would receive only a 34% pension. 5 U.S.C. § 8415(d). Of course, it is possible that Social Security and voluntary Thrift Savings Plan benefits would compensate for this difference.

they were subject to the mandatory retirement age of the CSRS, as was Dungan. When they were rehired, however, they were permitted to select between the two plans. Dungan had been given this same choice in 1987.[5] Because some of these rehired ATCs elected to be enrolled in the FERS and because they had fewer than twenty years of service at age fifty-six, they are being allowed to work to an older age than they would have had they never gone on strike. This difference is caused not by their status as strikers, however, but because they had a break in service. An ATC who had a similar break in service for other reasons would have received the same benefit.

The Administrator and the Secretary are required to impose different mandatory retirement schemes on different ATCs due to a legislative mandate. Because that mandate is rationally related to a legitimate government purpose, it does not violate Dungan's right to equal protection.

C. Due Process

Dungan's last substantive claim is that the Administrator and the Secretary denied him his Fifth Amendment right to due process by denying his request for a waiver from the mandatory requirement provisions of the CSRS. This argument fails because Dungan had no property

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[5] As the District Court noted, even if Dungan had elected to enroll in the FERS, he would have been forced to retire at age fifty-six because he already had twenty years of service.

interest in, or legitimate expectation of, a waiver of the mandatory retirement rules.

Before any process is due under the Fifth Amendment, a claimant must demonstrate that there has been a deprivation of an interest in life, liberty, or property. *Mathews v. Elderidge*, 424 U.S. 319, 332 (1976). There is generally not a property interest in continued public employment unless a claimant can demonstrate a "legitimate claim of entitlement to it." *Board of Regents v. Roth* 408 U.S. 564, 577 (1972).

Dungan cannot maintain that he had any legitimate expectation to continued employment as an ATC past age fifty-six, or even any expectation that his waiver request would be submitted to the Secretary. The governing statute states that the Secretary "*may* exempt" an ATC from mandatory retirement. 5 U.S.C. § 8335(a). This clearly indicates that the decision as to whether to grant a waiver is discretionary. Further, the Secretary is empowered to make this decision "under such regulations as he [or she] may prescribe." *Id.* The regulations that have been adopted require that an application be approved at every level before it is submitted to the Administrator and the Secretary. Lack of approval at any level functions as a denial of the application. The decision that no waiver requests would be approved was clearly within the discretionary power of the Secretary. Dungan claims that the refusal to consider his request was arbitrary and capricious, but he overlooks the fact that the Secretary is not required to consider any waiver request. In fact, the evidence shows that rather than being arbitrary and

capricious, the refusal to consider requests has been consistently applied since the policy was announced in 1995 and that no waivers have been granted since that time.

Because Congress granted broad discretion to the Secretary to make decisions about waivers, Dungan had no property interest in receiving a waiver or even in having his request considered by the Secretary. In the absence of such a property interest, no process was due under the Fifth Amendment and Dungan's constitutional rights were not violated.

D. Pre-Trial Procedures

Finally, Dungan claims that the District Court err ed by refusing his request for certain pre-trial procedures and by not making any class-related decisions. Because we will affirm the grant of summary judgment on the merits, we need not consider this argument.

CONCLUSION

For the foregoing reasons, the judgment of the District Court will be affirmed.

TO THE CLERK OF THE COURT:

Kindly file the foregoing Memorandum Opinion.

/s/ Maryanne Trump Barry
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-1128

DEAN DŪNGAN,
Appellant

v.

RODNEY E. SLATER, SECRETARY,
UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION;
JANE GARVEY, ADMINISTRATOR,
UNITED STATES OF AMERICA
FEDERAL AVIATION ADMINISTRATION

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF PENNSYLVANIA
D.C. Civil No. 99-cv-2376
District Judge: The Honorable Raymond J. Broderick

Submitted Under Third Circuit LAR 34.1(a)
March 13, 2001

Before: MANSMANN, BARRY, and COWEN
Circuit Judges

JUDGMENT

This cause came to be heard on the record from the United States District Court for the Eastern District of

Pennsylvania and was submitted under Third Circuit LAR 34.1(a) on March 13, 2001.

After consideration of all contentions raised by the appellant, it is

ADJUDGED and ORDERED that the judgment of the District Court be and is hereby affirmed.

Costs taxed against appellant.

ATTEST:

/s/ [Illegible]
Acting Clerk

Dated: 19 March 2001

Costs Taxed in Favor of the Secretary of Transportation and the Administrator of the Federal Aviation Administration as follows:

Total for Brief $72.10

Total $72.10

Certified as a true copy and issued in lieu of a formal mandate on June 22, 2001.

Teste: [Illegible]

Acting Clerk, United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

March 30, 2001

No. 00-1128

DEAN DUNGAN, Appellant
v.
RODNEY E. SLATER, et al.
(E.D. of PA. Civil No. 99-cv-02376 (RJB))

Present: MANSMANN, BARRY and COWEN, *Circuit Judges.*

Motion by Appellee to publish the Court's Memorandum Opinion.

/s/ Anthony Infante
Anthony Infante 267-299-4916
Case Manager

Response due 4/11/01.

The Court's Memorandum Opinion & Judgment were filed on 3/19/01.

The Mandate is be Issued on 5/10/01.

ORDER

The foregoing motion is granted.

By the Court,

/s/ Maryanne Barry
Circuit Judge

Dated: 05 JUN 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DEAN DUNGAN	:	CIVIL ACTION
	:	NO. 99-CV-2376
v.	:	
RODNEY E. SLATER, Secretary, United States Dept. of Transportation, and JANE GARVEY, Administrator, United States Federal Aviation Administration	:	

ORDER

AND NOW, this 24th day of February, 2000; Defendants having filed a motion for summary judgment; Plaintiff having opposed; for the reasons stated in the memorandum filed on this date:

IT IS ORDERED:

1. Defendants' motion for summary judgment (docket no. 8) is **GRANTED** as to all counts.

2. Judgment is entered in **FAVOR** of Defendants and **AGAINST** Plaintiff on all counts of the complaint.

3. The Clerk shall mark this case **CLOSED**.

/s/ Raymond J. Broderick
RAYMOND J. BRODERICK, J.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-1128

DEAN DUNGAN,

Appellant

v.

RODNEY E. SLATER, SECRETARY, UNITED STATES OF AMERICA DEPARTMENT OF TRANSPORTATION; JANE GARVEY, ADMINISTRATOR, UNITED STATES OF AMERICA FEDERAL AVIATION ADMINISTRATION

Present: BECKER, *Chief Judge*, SLOVITER, MANSMANN, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, and COWEN* *Circuit Judges*

SUR PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*

The petition for rehearing en banc filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and a majority of the circuit judges of the circuit in regular active service not

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* Honorable Robert E. Cowen, United States Circuit Judge, limited to panel vote only.

having voted for rehearing by the court *en banc*, the petition for rehearing en banc is DENIED.

BY THE COURT:

/s/ Maryanne Barry
Circuit Judge

DATED: 14 JUN 2001

APPENDIX "C"

5 U.S.C. § 8335. Mandatory separation

(a) An air traffic controller shall be separated from the service on the last day of the month in which he becomes 56 years of age. The Secretary, under such regulations as he may prescribe, may exempt a controller having exceptional skills and experience as a controller from the automatic separation provisions of this subsection until that controller becomes 61 years of age. The Secretary shall notify the controller in writing of the date of separation at least 60 days before that date. Action to separate the controller is not effective, without the consent of the controller, until the last day of the month in which the 60-day notice expires.

* * *

Public Law 92-297

"§ 3109. Air traffic controller

"For the purpose of this title, 'air traffic controller' or 'controller' means an employee of the Department of Transportation who is actively engaged in the separation and control of air traffic, or who is the immediate supervisor of an employee actively engaged in the separation and control of air traffic, in an air traffic control facility. The secretary of Transportation may prescribe regulations to determine the application of this section."

(b) The analysis of chapter 31 of title 5, United States Code, is amended by adding the following new item at the end thereof:

* * *

AIR TRAFFIC CONTROLLERS
P.L. 92-297

AIR TRAFFIC CONTROLLERS – CAREER PROGRAM

House Report (Post Office and Civil Service Committee) No. 92-516, Sept. 27, 1971 [To accompany H.R. 8083]

Senate Report (Post Office and Civil Service Committee) No. 92-774, May 1, 1972 [To accompany H.R. 8083]

Cong. Record Vol. 117 (1971)

Cong. Record Vol. 118 (1972)

DATES OF CONSIDERATION AND PASSAGE

House October 4, 1971; May 9, 1972

Senate May 3, 1972

The Senate Report is set out.

SENATE REPORT NO. 92-774

THE Committee on Post Office and Civil Service, to which was referred the bill (H.R. 8083) to amend title 5, United States Code, to provide a career program for, and greater flexibility in management of, air traffic controllers, and for other purposes, having considered the same, reports

favorably thereon with amendments and recommends that the bill as amended do pass.

Purpose

H.R. 8083 is designed to improve the conditions of employment for individuals employed as air traffic controllers in the Department of Transportation by offering preferential retirement benefits, job training and improved appeal procedures for controllers removed from control work, and the establishment of maximum recruitment and retention ages for controllers.

Justification

For several years, both the executive and legislative branches have recognized that employees of the Federal Government who are engaged in the separation and contrl of aircraft at airport towers and in regional radar control centers occupy positions requiring precise skills upon which aviation safety depends and taxing heavily the physical and mental strength of the individuals involved.

Efforts to resolve the problem have been frustrated. During the 1960's, the Bureau of the Budget curtailed funds for training new controllers at the FAA training center in Oklahoma City, resulting in completely unacceptable work levels for almost all controllers, and leading to the virtual collapse of the system in 1970. Many controllers reported in sick or operated traffic at less than their ordinary schedule, resulting in extending flight arrival and departure times to a substantial extent.

Although there are several groups of employees in the Government whose employment is hazardous, including law enforcement officers, Canal Zone pilots, customs inspectors, Treasury agents, and others, air traffic controllers are unique in that their work involves both physical and mental strain for the controller, and the safety of the public traveling by air. At large air terminals and en route centers in the United States, the role and importance of the controller is primary, a status to which airline pilots are the first to testify. Over a period of time, the physical and mental efforts of monitoring radar screens to track all aircraft within the range of a regional facility or tower or controlling tower traffic visually, or both, simply becomes too much for the average individual to sustain. Like skilled athletes, most controllers lose proficiency to some degree after age 40, and in the interest of the public's safety, should not be retained as controllers in busy facilities beyond the time they can perform satisfactorily. Under existing law, there is little that can be done to alleviate this problem.

H.R. 8083 proposes to offer the controller and the Department of Transportation two basic solutions to the problems of recruiting and retaining the highest quality of personnel for air traffic control, and insuring that a controller, once he is past his most efficient years of service, will have reasonable opportunities for employment in or out of the Government service if he leaves his position as a controller.

First, H.R. 8083 permits the Secretary of Transportation to remove a controller who has at least 5 years' service from his position if he is no longer able to handle the level of work necessary for the job, and, if the

employee desires, to offer him a period of training for other employment, within or without the Government, for a period of not more than 2 years at Government expense. During his period of training, the controller will be paid at the rate he was paid at the time of his removal from control work. After training, he may be placed in another Government agency position, or leave the Government and enter private industry.

This training opportunity will remove much of the natural anxiety which controllers now feel when they are asked to step aside from active control work. Their qualifications for employment in positions other than control work are not generally high since they have performed 15 or 20 years of service exclusively engaged in the separation and control of aircraft. A journeyman controller with 15 years of service now earns between $20,000 and $25,000 a year. To retire from that kind of economic status to the hazards of seeking employment for which he may have little or no qualification is an extremely difficult proposition. But if the Government offers an opportunity for a controller to train for other employment, and sustain his old rate of pay during the period of training, the adjustment will be much easier for the employee, and the overall air traffic control program will be improved.

Secondly, the civil service retirement provisions of title 5, United States Code, are amended to offer early retirement benefits to controllers which are not applicable to any other class of employees.

Under existing law, any employee may retire on a full annuity at age 55 with 30 years' service, at age 60 with 20 years' service, or at age 62 with 5 years' service. If an

employee is involuntarily separated not for cause, he is eligible for a reduced annuity at age 50 if he has 20 years' service, or if he has 25 years' service regardless of age. Law enforcement officers may retire, upon approval of their employing agency and the Civil Service Commission, under the involuntary separation provision. No employee may voluntarily retire and receive an immediate annuity before reaching age 55.

The requirements of the present law are too strict when applied to air traffic controllers. The average controller enters the service in his early twenties, often after military service, and by the time he is qualified as a journeyman controller, is near 30. If he entered the FAA at age 25, he would have to complete 30 years of service before becoming eligible for retirement. Although there are some exceptions to the general rule, most controllers are not able to control traffic in busy facilities at any age near 55 – the physical and emotional strength required to do the job, to work odd and continuously changing work shifts, and to insure air safety for the traveling public is simply too much for any man in that age bracket.

The committee recommends that air traffic controllers be separated from the normal retirement requirements of the civil service system and offered a preferential system. H.R. 8083 provides that new system:

> 1. A controller may retire at age 50 if he has completed 20 years of service as a controller, and his right to retire after completing that basic 20 years' service as a controller shall not be affected if he leaves his position as a controller to accept another position;

2. A controller may retire after 25 years of service as a controller regardless of age, and his right to retire after completing that basic 25 years' service as a controller shall not be affected if he leaves his position as a controller to accept another position.

3. A controller shall be guaranteed an annuity equal to not less than 50 percent of his average salary over the highest 3 years of his service. This means that a controller with 20 years of service who is age 50 will receive an annuity of 50 percent of his average pay rather than 36¼ percent, which is the annuity otherwise applicable to an employee having 20 years of service.

The committee recognizes that selecting air traffic controllers for preferential retirement treatment constitutes a significant change of policy for the civil service retirement system, but the unique employment of these employees justifies such a system. No other Government worker is so directly involved in the safety of millions of Americans who travel by air each year, or the safety of many millions of dollars of aviation equipment used to transport the public. That no other group has such a preferential system is not a logical argument for denying such benefits for a unique group.

Flight Service Station Personnel and Defense Department Controllers

The committee has given careful consideration to the petitions of employees of flight service stations and civilian controllers outside the Department of Transportation

to be included within the new retirement benefits established by H.R. 8083. By an informal vote, the committee decided that at this time these two groups of employees would not be covered.

However, in lieu of immediate coverage, the committee requests that the Department of Defense, in the case of civilian controllers employed therein, and the Department of Transportation, in the case of flight service station employees, submit to the committee a report on the justification for including or excluding these two groups from the provisions of this bill.

Flight service station employees seem particularly suited for inclusion in this program for several reasons. For instance, when an air traffic controller at a major facility loses his proficiency and should not continue as a controller, he could easily be transferred to a flight service station and continue to render valuable service to the Government and the public, but the lack of a similar retirement program for service station employees works to his complete disadvantage. In some cases, it appears that flight service station employees go far beyond the basic task of supplying weather information for aviators. If in fact FSS employees are engaged in activities involving the separation and control, or either, of aircraft, they are controllers to the extent that they perform such duties, and it is inequitable to exclude them from the new program.

A complete report on this issue should be submitted to the committee by the beginning of the 93d Congress.

Sectional Analysis

Section 1 of the bill offers a definition of who is an air traffic controller for the purposes of this bill. A controller is a person who is directly engaged in the separation and control of aircraft, or a person who is the immediate supervisor of such a person. It does not apply to persons who are on some level of supervision above active control. The Secretary of Transportation shall determine the applicability of the definition. The committee believes that it is in the best interest of the Government for the Secretary to include employees who are marginally involved in air traffic control rather than exclude such employees. That an employee maintains physical and technical proficiency for control work should not automatically entitle him to coverage – the end result of that would be that all employees regardless of their work would maintain proficiency and have it written into their job description. But the fact that an employee does not read a scope or bring in airplanes does not mean that he is not directly engaged in the separation and control of aircraft. His work may be so closely related – that is, directly involved – that he is in fact a controller even though it is not in his primary job description. The committee believes that such an employee should be included.

In some instances, the committee has observed that second-line supervisors are frequently involved in control work. Manpower limitations, patterns of traffic, and other factors may require that an employee who is higher than the first line supervisor is in fact directly engaged in control. If this situation occurs, the employee should be covered. He should in no circumstances be excluded

merely because his status or job description is beyond the purview of the letter of the definition. It is far more important to determine what he does rather than what his job description says he does in order to decide whether he is covered.

Section 2 provides authority for the Secretary of Transportation to set a maximum entry age for initial appointments for air traffic controllers. Section 2(c) is a restatement of existing law.

Section 3 enacts a new section 3381 to title 5, United States Code, which establishes the job training program for air traffic controllers who are removed from their positions either before they become eligible for retirement benefits or when they are eligible. This provision differs from the administration recommendation, which did not offer the employee eligible for retirement any job training opportunities. The committee recommends that the training offer be across the board to all controllers, and that the training opportunity be the right of the employee, if he wishes to exercise it, rather than discretionary authority with the Agency. The type and duration of training is within the authority of the Agency to establish, and should be carried out in a manner to benefit the employee and the program itself.

The language of section 3 has been redrafted, but the substance of the provision, except as noted above, has not been altered.

Section 3 also enacts a new section 3382 to title 5, United States Code, relating to civil service retirement. The Secretary of Transportation may remove an employee in the interest of aviation safety, the efficient control of air

traffic, or for the physical or mental health of the employee. An employee so removed does not have an appeal to the Civil Service Commission, but does, under the new section 3382, have appeal to a board of review, which shall have the power to determine the validity of the Secretary's action and issue a decision which shall be binding on the employee or the Secretary. The board of review shall be constituted of three members, one selected by the employee, one by the Secretary, and one by the Chairman of the Civil Service Commission, who shall serve as the chairman of the board of review. An employee who is not eligible for retirement under the new early retirement provisions of H.R. 8083 continues to have his rights of appeal to the Civil Service Commission from any decisions of the Secretary or the board of review, as applicable.

Section 4 provides a maximum age limit for air traffic controllers. A controller may not work past the last day of the month in which he reaches age 56, unless the Secretary approves his continuance in the service as a controller until age 61. The committee interprets this language to grant complete authority to the Secretary in regard to the extension, which may be withdrawn at any time during that 5-year period. The controller does not acquire the right to work an additional full 5 years simply because the Secretary has granted an extension of service time to him.

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